Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, *et al.*,

Petitioners,

—v.—

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

—v.—

TODD ROKITA, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF R. MICHAEL ALVAREZ, LONNA RAE ATKESON, DELIA BAILEY, THAD E. HALL, AND ANDREW D. MARTIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS [POLITICAL SCIENCE RESEARCH]

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William H. Riker & Peter C. Ordeshook,
A Theory of the Calculus of Voting,
62 Am. Pol. Sci. Rev. 25 (1968) 5

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Other Authorities:

R. Michael Alvarez, Lonna Rae Atkeson & Thad E. Hall, *The New Mexico Election Administration Report: The 2006 November General Election* (Aug. 2, 2007), *available at* http://www.vote.caltech.edu/ reports/NM_Election_Report_8-07.pdf 2, 3, 15

R. Michael Alvarez, Delia Bailey & Jonathan Katz, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/media/documents/ wps/vtp_wp57.pdf ..... *passim*

Lonna Rae Atkeson, Lisa A. Bryant, Thad E. Hall, Kyle L. Saunders & R. Michael Alvarez, *New Barriers to Voter Participation: Application of New Mexico's Voter Identification Laws* 2007, *available at* http://www.vote.caltech.edu/reports/NMvoterid.pdf 2, 15

Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 5, 2007) (unpublished manuscript), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.doc . 7, 9

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Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black, and Asian Voters* (Sept. 1, 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/apsa07_proceeding_209601.pdf 7, 8, 9

M.V. Hood III & Charles S. Bullock, III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* (April 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf 7, 8, 9

John R. Lott, Jr., *Evidence of Voter Fraud and the Impact That Regulations to Reduce Voter Fraud Have on Voter Participation Rates* (Aug. 18, 2006) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf 12, 13

Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (unpublished manuscript) *available at* http://www.vote.caltech.edu/ VoterID/apsa07_proceeding_211715.pdf 13

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Nat'l Center for Educ.,
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U.S. Census Bureau,
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INTEREST OF THE *AMICI CURIAE*[1]

Amici are five political scientists who study elections, the electoral process, and voting. Many have studied the impact of voter identification laws like the Indiana law petitioners challenge. Because social science evidence regarding the impact of voter identification laws has played a prominent role in this litigation, *amici* submit this brief to offer the Court a guide to the state of the literature on the subject.

R. Michael Alvarez is Professor of Political Science at the California Institute of Technology. Alvarez has focused most of his research and teaching on the study of electoral politics in the United States. He has published research on electoral behavior and public opinion in the United States and other advanced industrial democratic nations. Together with Delia Bailey and Jonathan Katz, he has recently conducted the most exhaustive study of the impact of voter identification laws to date. *See* R. Michael Alvarez, Delia Bailey & Jonathan Katz, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/media/documents/wps/vtp_wp57.pdf. And together with Lonna Atkeson and Thad Hall, he studied the administration of the 2006 election in New Mexico—including the implementation of the state's voter

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[1] The parties have filed blanket letters of consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6 *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici* and their counsel made a monetary contribution intended to fund its preparation or submission.

identification law. *See* R. Michael Alvarez, Lonna Rae Atkeson & Thad E. Hall, *The New Mexico Election Administration Report: The 2006 November General Election* (Aug. 2, 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/reports/NM_Election_Report_8-07.pdf.

Lonna Rae Atkeson is a Professor and Regents' Lecturer in the Political Science Department at the University of New Mexico. She has published studies in a number of fields, including elections, political behavior, and political methodology. She has recently studied racial disparities in the street-level administration of voter identification laws. *See id.* at 54; *see also* Lonna Rae Atkeson, Lisa A. Bryant, Thad E. Hall, Kyle L. Saunders and R. Michael Alvarez, *New Barriers to Voter Participation: Application of New Mexico's Voter Identification Laws* (2007), (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://www.vote.caltech.edu/reports/NMvoterid.pdf.

Delia Bailey is a Fellow at the Center for Empirical Research in the Law at the Washington University Law School in St. Louis. She studies and writes about voting behavior, political representation, judicial elections and election reform, as well as empirical research methodologies. She coauthored the recent exhaustive study of the impact of voter identification laws. *See* Alvarez, Bailey & Katz, *supra*.

Thad E. Hall is Assistant Professor in the Department of Political Science and a Research Fellow at the Institute of Public and Interna-

tional Affairs at the University of Utah. He has published research on the administration of elections and the implementation of voting technologies. He is the principal investigator of the Election Assistance Commission's Vote Count and Vote Recount Study, which examines election procedures and laws in all 50 states and the District of Columbia related to voting and vote recounts. He also coauthored the study of the administration of New Mexico's recent election. *See* Alvarez, Atkeson & Hall, *supra*.

Andrew D. Martin is Professor of Political Science and Professor of Law at Washington University in St. Louis. He is the Chair of the Political Science Department in the Faculty of Arts & Sciences and serves as the founding Director of the Center for Empirical Research in the Law in the School of Law. Professor Martin specializes in political methodology, Bayesian statistics, and American political institutions.

SUMMARY OF ARGUMENT[2]

As political scientists who study voting behavior, *amici* begin with their disciplinary first principles: when government policies make the act of voting more costly, they reduce the propensity of otherwise eligible citizens to participate in any given election, all else equal. Petitioners have demonstrated that Indiana's voter identification law makes the act of voting more costly, and the

[2] Counsel for *amici* gratefully acknowledge the assistance in preparing this brief of Ms. Shelly Cohen, an associate at the law firm of Kaye Scholer LLP who is awaiting admission to the bar of the State of New York.

weight of the social science evidence indicates that a law like Indiana's will depress voter turnout, particularly among poor, less educated, elderly, and minority voters. Three types of studies point to this conclusion. First, multiple studies have shown that elderly voters and racial and ethnic minorities are significantly less likely to have government-issued photographic identification than are other voters. Second, a number of other studies, including a recent study coauthored by two signatories to this brief, have shown that the implementation of restrictive voter identification laws depresses turnout, particularly among poorer and less educated voters. Two studies purport to show that restrictive voter identification laws have no such effect, but both those studies have significant methodological flaws. Third, a study conducted by three signatories to this brief has shown that voter identification laws are subject to arbitrary and discriminatory application by poll workers.

ARGUMENT

Laws Requiring Photographic Identification for Voting Impose Severe Burdens on Voters

Amici submit this brief to address two questions: (1) whether the Indiana law requiring voters to present government-issued photographic identification at the polls imposes a significant burden on voting; and (2) whether the Indiana law imposes especial burdens on an identifiable group of voters. Under this Court's precedents, these questions are central to this litigation. *See*,

e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("severe" restrictions on voting are subject to strict scrutiny, while "reasonable, nondiscriminatory restrictions" must be balanced against "the State's important regulatory interests") (internal quotation marks omitted). Both petitioners and respondents point to social science evidence on these questions. As political scientists who have worked extensively in this area, *amici* submit this brief as a guide to the key studies bearing on the questions before the Court.

Amici start with first principles: When government policies make the act of voting more costly, they will reduce the propensity of otherwise eligible citizens to participate in any given election, all else equal. This finding stems from classic works in the discipline, *see, e.g.*, Anthony Downs, *An Economic Theory of Democracy* (1957); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 Am. Pol. Sci. Rev. 25 (1968), and it has proven remarkably robust in subsequent years. In the decades since the publication of the influential studies by Downs and Riker and Ordeshook, scholars have continued to analyze the costs associated with the act of voting and to demonstrate that increasing those costs is associated with decreasing voter participation.[3]

The extensive research addressing the impact of increasing the cost of voting provides an important context for the arguments in this brief:

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[3] For a recent review of the literature, see Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 Perspectives on Pol. 507 (2004).

Procedural barriers to participation—like the requirement that a voter must present government-issued photographic identification at the polls to exercise his or her franchise—raise the costs associated with voting and, all else equal, will reduce voter participation. In their briefs before this Court, petitioners have amply shown that Indiana's voter identification law imposes substantial costs on a significant fraction of eligible voters. From a political science perspective, there is little doubt that such a law depresses voter participation; the only questions are *how much* of a depressive effect it has and *which segments of the electorate* are likely to be most hampered in participation.

In the balance of this brief, *amici* examine the empirical evidence regarding the effects of requirements that voters show government-issued photographic identification at the polls and the differential administration of those requirements. There are two principal ways a researcher might approach this issue. The researcher might examine how many (and which) eligible voters actually have the identification documents required by the law, or the researcher might examine what happens to voters after the adoption of the law. Scholars have undertaken both of these sorts of studies, and the weight of the evidence bears out what first principles predict: The requirement to present government-issued photographic identification at the polls significantly depresses voter participation, and its bite reaches some segments of the electorate more than others.

A. Racial Minorities and Older People are Less Likely to Have the Photographic Identification Indiana Requires of Voters

There is substantial evidence that racial minorities and older people are less likely to have the kinds of government-issued photographic identification that the Indiana law requires most voters to present at the polls.[4] Three studies, each focusing on a particular state, have examined which groups are more and less likely to have government-issued photographic identification. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 5, 2007) (unpublished manuscript), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.doc (reporting results of a telephone survey of voters in Indiana); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* (Apr. 2007) (unpublished manuscript, presented at the March 2007 Annual Meeting of the Southwestern Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf (comparing Georgia department of motor vehicles data with data from the state's

[4] Indiana law provides for the following limited exemption from the requirement that government-issued photographic identification be presented at the polls: a "voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code § 3-11-8-25.1(e). Additionally, absentee voters who cast ballots by mail need not provide such identification. *Id.* § 3-11-10-1.2.

voter registration and voter history databases); John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* (June 2005) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/DriversLicense.pdf (comparing data from the Wisconsin state department of motor vehicles with census data).

Each of these studies concludes that the impact of photographic identification requirements falls more heavily on racial minorities, because racial minorities are less likely to have the demanded forms of identification.[5] The Indiana study found that 88.5 percent of white registered voters, as compared to only 81.9 percent of black registered voters, have a government-issued ID that satisfies that state's requirement. *See* Barreto *et al.*, *supra*, at 8 tbl.1. Regression analysis confirmed the racial skew. *See id.* at 13 tbls. 3-4. The Georgia study similarly found that "[i]n comparison to white registrants, all four racial/ethnic categories included in the model have a significantly higher probability of not possessing either a driver's license or state identification card." Hood & Bullock, *supra*, at 14. Notably, black regis-

[5] Yet another study, based on exit polls from the 2006 elections in California, New Mexico, and Washington State, found that minority voters are less likely than whites to be able to present a driver's license and one other identification document at the polls. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black, and Asian Voters* 1 (Sept. 1, 2007) (unpublished manuscript, presented at the 2007 Annual Meeting of American Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/apsa07_proceeding_209601.pdf.

trants were more than 83 percent more likely than white registrants not to possess such an identification, and Hispanic registrants were nearly *twice* as likely as whites not to possess such an identification. *See id.* at fig. 1. And the Wisconsin study also found a significant racial skew. *See* Pawasarat, *supra*, at 3 ("Statewide, the percent of Wisconsin residents with a valid driver's license is 80 percent for males and 81 percent for females. For African-Americans, only 45 percent of males and 51 percent of females have a valid driver's license. Hispanics show 54 percent of males and only 41 percent of females with a valid driver's license.")[6] Each study also found that elderly voters are also significantly less likely to have the government-issued photographic identification that the Indiana statute demands of voters. *See* Barreto, *et al.*, *supra*, at 8 tbl. 1; Hood & Bullock, *supra*, at 14 fig. 1; Pawasarat, *supra*, at 11.

In short, evidence from both voter surveys and state records shows that racial minorities and elderly individuals are significantly less likely to have government-issued photographic identification. When a state law, like Indiana's, requires voters to present identification in order to cast a ballot, it will predictably depress the voting rates of racial minorities and elderly individuals.

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[6] The Georgia and Wisconsin studies examined state-issued identifications only; they did not examine the racial skew in possession of military identification. Although that is a limitation of those studies, it is only a minor one. Individuals who are serving in the military are likely to have drivers' licenses as well, so the failure to count military identifications is unlikely to have changed the results of these studies in any material way.

B. Stringent Voter Identification Requirements Have Been Shown to Depress Voting, Especially Among Individuals with Less Education and Income

Other studies have looked directly at what has happened when states have implemented stringent voter identification requirements. The newest and most sophisticated of these studies is coauthored by two of the signatories to this brief. *See* Alvarez, Bailey & Katz, *supra*. Alvarez, Bailey, and Katz use data from the Census Bureau's Current Population Survey (CPS) to "document[ ] the effect of voter identification requirements on registered voters as they were imposed in states in the 2000 and 2004 presidential elections, and in the 2002 and 2006 midterm elections." *Id.* at 2. In order to control for the many factors unrelated to voter identification laws that cause turnout rates to vary among states, and to control for the cyclical changes in turnout that all states will experience from year to year, they use what is called a "multilevel" or "random effects" model. *Id.* at 10.

Applying their model to individual-level data from the CPS, Alvarez, Bailey, and Katz find that the imposition of a voter identification requirement has a significant and negative effect on turnout. *See id.* at 16. The imposition of a requirement of photographic identification, they find, has the largest negative effect of all of the voter identification requirements on the probability that an individual will vote. *See id.* at 17. Restrictive voter identification laws have particularly significant effects on people with less education and lower incomes. *See id.* at 18-20.

But, *independent* of those effects, Alvarez, Bailey, and Katz find that the laws have no effect on the turnout of nonwhite voters. *See id.* at 18 ("*Controlling for the factors usually seen in models of voter participation*, we see no evidence that voter identification [requirements] are racially discriminatory.") (emphasis added); *id.* at 19 ("[W]e find no evidence to support the hypothesis that this effect is more profound for nonwhite registered voters, *controlling for other variables, especially income and education.*") (emphasis added).

In other words, restrictive voter identification laws may depress the probability that some groups of nonwhite voters will cast ballots (as other studies have found[7]), but they do so because nonwhite voters in those groups tend to have less education and lower incomes than white voters. *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006*, at 7 (Aug. 2007), *available at*

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[7] *See* Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Laws on Turnout* (2006) (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf (finding that more stringent voter identification requirements disproportionately reduce the turnout of Latino voters). Vercellotti and Anderson's study also concludes that the implementation of some forms of identification requirements (signature matches and non-photo identification provision) reduced voter participation. But the study examines data from only one election, which limits both the study's sample size and the degree to which one can draw causal conclusions from it. *See* Alvarez, Bailey & Katz, *supra*, at 4-6 (describing methodological differences with the Vercellotti and Anderson study).

http://www.census.gov/prod/2007pubs/p60-233.pdf ("Black households had the lowest median income in 2006 among the race and Hispanic-origin groups, $31,969, which was 61 percent of the median for non-Hispanic White households, $52,423. . . . Median income for Hispanic households was $37,781 in 2006, which was 72 percent of the median for non-Hispanic White households."); Nat'l Center for Educ., *Statistics, Status and Trends in the Education of Racial and Ethnic Minorities*, 122-23 (2007), *available at* http://nces.ed.gov/pubs2007/2007039.pdf (showing that whites on average score higher on measures of educational attainment than blacks, Hispanics, or Asian-Pacific Islanders); *cf. Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) ("moral turpitude" law that was intended to disenfranchise blacks and poor whites was intentional race discrimination in violation of the Fourteenth Amendment).

Two studies purport to show that restrictive voter identification laws do not suppress turnout, but they do not undermine the conclusions of the Alvarez, Bailey, and Katz study. One study, prepared by John Lott, analyzes county-level data for general and primary elections from 1996 through 2004. *See* John R. Lott, Jr., *Evidence of Voter Fraud and the Impact That Regulations To Reduce Voter Fraud Have on Voter Participation Rates* (Aug. 18, 2006) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf. Lott's aggregate data analysis finds no evidence that the voter photo identification requirements *in place during that period* decreased voter participation rates, but

neither the Indiana law at issue in this case nor any law strictly requiring that photo identification be presented to cast a valid ballot was in place during the period Lott studied. Lott himself notes that "it is still too early to evaluate any possible impact of mandatory photo IDs on U.S. elections." *Id.* at 11.

Another recent analysis uses the 2000, 2002, 2004, and 2006 American National Election Studies (NES) to measure the effect of voter identification requirements on turnout in federal elections. *See* Jason D. Mycoff, Michael W. Wagner, & David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/apsa07_proceeding_211715.pdf. Mycoff, Wagner, and Wilson, like Lott, conclude that voter identification requirements have no effect on turnout. But their study has significant flaws. For one thing, although the authors utilize data from the same four recent federal elections as do Alvarez, Bailey, and Katz, they analyze each year separately. As a result, they cannot isolate whether a state's change in identification requirements has caused a drop in turnout. More important, the NES data used by Mycoff, Wagner, and Wilson are far less reliable than are the CPS data used by Alvarez, Bailey, and Katz. In particular, the NES data substantially overreport turnout compared to the CPS data.[8]

[8] For an explanation of the methodological flaws in the Mycoff, Wagner, and Wilson study, *see* Alvarez, Bailey & Katz, *supra*, at 5 & n.4.

In short, the balance of the evidence suggests that restrictive voter identification laws, like Indiana's law that requires voters to present government-issued photographic identification at the polls as a condition of exercising their franchise, do impose significant obstacles to voting. The studies that suggest the contrary are methodologically flawed. And those obstacles are especially significant for certain groups—people with low incomes and less education, and (derivatively) racial and ethnic minorities. This Court should accordingly conclude that the Indiana voter identification law does not impose merely "reasonable, nondiscriminatory restrictions" on voting. To the contrary, the restrictions it imposes are "severe," particularly for those demographic groups most affected by it. *Cf. Burdick*, 504 U.S. at 434.

C. Voter Identification Laws are Subject to Arbitrary and Discriminatory Application by Poll Workers

The evidence also suggests that voter identification laws are subject to arbitrary and discriminatory application at the polling place level—a concern that has pervaded this Court's voting cases. See, *e.g.*, *Bush v. Gore*, 531 U.S. 98, 105-08 (2000) (*per curiam*) (invalidating rules for counting ballots because they lent themselves to arbitrary application); *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part and dissenting in part) (upholding nationwide literacy test ban because Congress could have concluded that "racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory appli-

cation, either conscious or unconscious"); *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966) (discussing extensive evidence of discriminatory administration of literacy tests).

A study of the implementation of New Mexico's voter identification law in the 2006 election found that—despite receiving training from election administrators—polling places and even individual poll workers varied widely in their application of that law. *See* Alvarez, Atkeson & Hall, *supra*, at 25; *See* Atkeson, Bryant, Hall, Saunders & Alvarez, *supra* at 13-14 tbls. 1, 2. And the law provided the occasion for racial and ethnic discrimination at the polling place level—voters who self-identify as Hispanic or who have Hispanic surnames were significantly more likely to be asked by poll workers for identification than were other voters. *See* Alvarez, Atkeson & Hall, *supra*, at 54; *See* Atkeson, Bryant, Hall, Saunders & Alvarez, *supra*, at 18-20.

The evidence therefore suggests that, in addition to the disparate burdens voter identification laws *inherently* place on voters, the implementation of those laws by poll workers on election day will introduce additional arbitrariness and discrimination. This point further underscores the unconstitutionality of Indiana's requirement that voters present photographic identification at the polls to cast a valid ballot.

CONCLUSION

The judgment of the court of appeals should be reversed.

November 13, 2007

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